IN THE

Supreme Court of the United States

No. 138.

THE PULLMAN COMPANY, *Plaintiff in Error*, vs. WIRT ADAMS, State Revenue Agent, *Defendant in Error*.	Error to Supreme Court of Mississippi.

BRIEF FOR PLAINTIFF IN ERROR

This action was brought in a state court in Mississippi, by defendant in error, to recover from plaintiff in error certain privilege taxes for the years 1892, 1893 and 1894. The action was founded on the following provisions of the Mississippi code of 1892:

Chapter 108 of the Mississippi code of 1892 is entitled: "Privilege Taxes." The first section, 3317, is:

"A tax on privileges and levied as follows, to-wit,"

"3387. Sleeping-car Companies.

On each sleeping and palace car company carrying passengers from one point to another, within this state, one hundred dollars, and twenty-five cents per mile for each mile of railroad track on which the company runs its cars."

Section 3401 provides, among other things, that:

"Any person who shall exercise any of the privileges enumerated in this chapter without first paying the tax and procuring license as required, shall on conviction be fined not less than double the tax imposed on such privilege or shall be imprisoned in the county jail not more than six months, or both."

Plaintiff in error pleaded the general issue and two special pleas. The first special plea was as follows:

"And for a further plea in this behalf, defendant says that it is a foreign corporation incorporated by and under the laws of the state of Illinois, and having its domicile in the city of Chicago therein; that during the said years 1892, 1893 and 1894 it had no property, office nor resident agent or employee in the state of Mississippi engaged in the operation of the business mentioned in plaintiff's declaration, and that defendant's sleeping and palace cars are and were the only cars of such character ever run in the state of Mississippi; that the sleeping cars and palace cars in use in Mississippi were manufactured by defendant in Illinois and not run by defendant in Mississippi, but were run therein by the several railroad companies hauling the same, under contracts by the terms whereof defendant, for a specified consideration, was required to furnish the said cars, and, as a part of such consideration, acquired a right to charge each railroad passenger who should ride therein for a reserved seat in the day time and a bed at night; that the said railroads ran and hauled said sleeping-cars and palace cars into and through the state of Mississippi; and that the said cars were used and employed in interstate commerce and from points in Mississippi to points out of said state, from points outside of to points in Mississippi and from points outside of through that state to other points outside of the same; that the passengers carried on defendant's cars during said years from one point to another within the state of Mississippi [bore an inconsiderable proportion to the other passengers carried thereon, and that the statute of Mississippi] laying a tax upon the business so operated and imposing penalties of fine and imprisonment for the violation thereof was and is, as to this defendant, in con-

travention of Section 8 Article I of the Constitution of the United States committing to the Congress of the United States the regulation of commerce between the states, and is and was null and void; and this, defendant is ready to verify" (pr. rec. pp. 4-5).

The words in brackets were omitted by mistake.

The second special plea alleged substantially the same matters as the first special plea, and, in addition, that by the Mississippi Constitution of 1890, plaintiff in error was made a common carrier, that the profits realized from persons carried from point to point within the state had never equaled the expenses properly chargeable against that service and that the deficit thus arising had always operated as a burden upon its interstate business (pr. rec. pp. 5-6).

The section of the Constitution set up in the second plea is as follows:

"Section 195. Express, telegraph, telephone and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

This provision of the state constitution, declaring sleeping-car companies common carriers, of course laid upon such companies the obligation of furnishing their accommodations to all persons properly applying therefor, and thus compelled them to accept intra-state business upon interstate vehicles of transportation, whether the sleeping-car companies wished to do so or not. Such companies are probably subject to this duty of furnishing accommodations to persons properly applying therefor under the law of the land, independent of state constitutions or statutes.

Demurrers interposed to the two special pleas were sustained, and, the case going to trial, the court excluded all evidence of the matters set up in the special pleas and di-

rected the jury to find for the revenue agent. A motion for a new trial having been overruled, plaintiff in error prosecuted an appeal to the supreme court of Mississippi, which affirmed the judgment of the trial court on the opinion shown in the record (pr. rec. pp. 16-18).

In this opinion section 74 of the Mississippi act of 1898 is inadvertently cited as imposing the taxes sued for. Code section 3387 above quoted was the law in force during the years 1892-4 when the taxes sued for are alleged to have accrued and is the section considered by the state supreme court in its certificate of a federal question (pr. rec. pp. 24-25).

The sections are substantially similar, except that, in imposing the tax of twenty-five cent per mile, the act of 1892 imposed a tax on each mile "on which the company runs its cars," while section 74 of the act of 1898, quoted in the state supreme court opinion, provides for such taxes on each mile "over which the company runs its cars *in this state.*"

The character of the business in which plaintiff in error was engaged in Mississippi is fully shown in the record. It is an Illinois corporation, organized for and engaged in the business, among other things, of constructing and operating sleeping cars. These cars are furnished or rented to railroad companies to be used by such railroad companies in the transportation of passengers.

Plaintiff in error "did not in the years 1892, 1893 and 1894 run or operate sleeping cars." Such cars "were operated and run by railroad companies, and the Pullman Palace Car Company had no control over the running or operation of such cars" (pr. rec. pp. 11-12). These sleeping cars were therefore as much under the control of the railroad companies as any other rolling stock which they hired.

The Pullman Company, however, reserved the right to furnish sleeping accommodations to railroad passengers and to collect charges therefor, and for that purpose had sleeping-car conductors and porters on such sleeping cars. The sleeping-car company received no part of the charge for transportation.

The business in which the plaintiff in error was engaged in Mississippi and the joint use of the cars by the railroad and sleeping-car companies were therefore exactly the same as shown in *Pickard* v. *Pullman Company,* 117 U. S., 34.

The pleas demurred to set up that plaintiff in error had no property, office or resident agent or employee in the state of Mississippi, and the evidence shows (pr. rec. 11) that the plaintiff in error was not engaged in any business of any nature or character whatsoever in Mississippi during the years referred to, other than furnishing sleeping accommodations on said sleeping cars.

It also appears that *all* the sleeping cars of plaintiff in error referred to, were operated and run from points outside of Mississippi to points within that state; or from points within that state to points out of the state; or from points outside of the state through the state to other points outside of the state; and that none of such cars were used wholly within the state of Mississippi or used wholly between points within the state.

The case therefore is not embarrassed by any consideration of cars operated exclusively within the state. The continuous run of every car was principally without the state. The cars were operated over six or seven railroads that passed through the state, two of the principal of which were the Illinois Central Railroad and the Mobile & Ohio Railroad.

It appears from the evidence and the stipulation of facts (pr. rec. 8) that certain railroad passengers, riding on these interstate trains applied for and were furnished by plaintiff in error with certain sleeping accommodations from one point to another in Mississippi. It was set up in the special pleas that such local passengers bore an inconsiderable proportion to the other passengers carried on such cars, and that the profits realized from such local passengers had never equaled the expenses properly chargeable against the same, and that the deficit thus arising from local business always operated as a burden on the interstate business.

The special pleas were held bad on demurrer. Evidence was offered in support of these allegations of the special pleas but the court refused to admit such evidence (pr. rec. 9).

Of course plaintiff in error was obliged to furnish these local passengers with sleeping car accommodations whether it wished to do so or not. It was not at liberty to decline to engage in this local business.

Errors Relied on.

Plaintiff in error insists that under the circumstances of this case no privilege tax can be imposed upon it or the business in which it is engaged, because it is engaged in interstate commerce and any such tax is an interference with the freedom of interstate commerce and that the fact that a few local passengers are carried on the interstate cars does not give the state of Mississippi the right to impose the tax sought to be collected in this action.

The errors assigned appear upon pages 29 and 30 of the printed record and are as follows:

"The said supreme court of the State of Mississippi erred in rendering the judgment of April 8, 1901, whereby the section 3387 of the Annotated Code of 1892 of said State was given effect as imposing a valid privilege tax upon the Pullman Company and the commerce between the States carried on by said company was burdened and regulated by said State legislation, contrary to clause 3 section 8, article 1 of the Constitution of the United States.

"2. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the second plea of the defendant, The Pullman Company, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States, as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

"3. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the third plea of the defendant, The Pullman Company, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

"4. The said supreme court erred in holding that the circuit court of Hinds county committed no error in charging the jury at plaintiff's request to find for the plaintiff, the said Wirt Adams, State revenue agent, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States."

BRIEF.

I.

The operation of the sleeping-cars and the business in which plaintiff in error is engaged in Mississippi constitute interstate commerce, and therefore the State cannot call such business a privilege and impose a privilege tax thereon.

Pickard v. *Pullman Co.*, 117 U. S., 34.
Crutcher v. *Kentucky*, 141 U. S., 47.
Leloup v. *Mobile*, 127 U. S., 640.

II.

There is a well-defined difference between a license tax affecting interstate commerce, which is void, and a properly proportioned property tax on property or capital stock engaged in interstate commerce.

Adams Express Co. v. *Ohio*, 165 U. S., 220.
American Refgtg. Co. v. *Hall*, 174 U. S., 70.
Pullman Co. v. *Penna.*, 141 U. S., 18.
Postal Co. v. *Adams*, 155 U. S., 688.

III.

If the interstate business and local business are necessarily so mixed as to preclude separation a tax thereon is invalid.

Ratterman v. *Western Union*, 127 U. S., 411.
Leloup v. *Mobile*, 127 U. S., 640.
State Freight Tax Case, 15 Wall., 277.

IV.

Plaintiff in error is obliged to furnish sleeping accommodations to travelers local to Mississippi as part of its interstate business, and therefore cannot carry on interstate business without subjecting itelf to this privilege tax.

Sec. 195 Mississippi Constitution of 1890.
Nevin v. *Pullman Co.*, 106 Ill., 222.
Elliott on Railroads, § 1617.

V.

The court will examine to see if applying a full license tax for accommodating a single local passenger on an interstate car is not done to evade the federal constitution and is not really a tax on interstate commerce.

Crutcher v. *Kentucky*, 144 U. S., 47.
U. S. Express Co. v. *Allen*, 39 Fed. Rep., 712.
Austin v. *Tenn.*, 179 U. S., 343.
Morgan v. *Louisiana*, 118 U. S., 455.

ARGUMENT.

THE OPERATION OF THE SLEEPING CARS AND THE BUSINESS IN WHICH PLAINTIFF IN ERROR IS ENGAGED IN MISSISSIPPI CONSTITUTE INTERSTATE COMMERCE AND THEREFORE THE STATE CANNOT CALL SUCH BUSINESS A PRIVILEGE AND IMPOSE A PRIVILEGE TAX THEREON.

In this case the business of plaintiff in error and its relations to the railroad companies are exactly the same as those shown in *Pickard* v. *Pullman Co.*, 117 U. S., 34, and it was there held to be engaged in interstate commerce.

The Tennessee statute in that case required the sleeping-car company "to pay to the comptroller by the first of July following $50 for each and every of said cars or coaches used or run over said railroads." As soon, therefore, as any sleeping-car went upon a road in Tennessee, it was required to pay $50 for the privilege of so doing.

In the present case it appears that sleeping-cars are operated over six or seven different railroads in Mississippi. As soon as a passenger demands sleeping-car accommodations between any two points in Mississippi, the law requires that such accommodations be furnished him, and thereupon the taxing act immediately takes effect, and plaintiff in error is required to pay certain privilege taxes, not measured by amount of business or amount or value of its property The entire tax is in force if only one dollar is realized from the business. If therefore a single passenger so demands accommodations on the Mobile & Ohio Railroad, there immediately springs up a privilege tax, payable in cash and on mileage, reckoned not only on the Mobile & Ohio Railroad,

but on the other six railroads on which sleeping-cars are operated.

This tax therefore is clearly a privilege or license tax, not in any way dependent on the amount of business done, the receipts from such business or the value of the property engaged in such business.

By the terms of the Tennessee act and also by the terms of the Mississippi act, the tax was distinctly declared to be a privilege tax. In the declaration in this case, in speaking of the time for which taxes are claimed, it is stated that:

"During all of said time there was imposed by law in Mississippi a *privilege* tax for each and every of said years."

In the case at bar the tax is not upon the property of plaintiff in error in Mississippi, nor upon a part of the property of plaintiff in error proportioned to the mileage in Mississippi, nor can it be, in any sense, called a property tax. Neither is it a tax upon receipts arising from business wholly within or without the state. It is purely and simply a license tax with a penalty provided for noncompliance. It does not pretend to be guaged by the amount of property or the amount of business done. The receipt of one dollar as a charge between two stations local to Mississippi, at once imposes the entire tax sued for, and that dollar must be accepted if tendered, even although it be tendered by an agent of defendant in error for the purpose of making plaintiff in error liable for the license fee. The arbitrary imposition of this tax if, as incidental to interstate business, a dollar is accepted from an interstate passenger, as surely and necessarily imposes a tax on interstate commerce as if the tax were imposed on any sleeping-car company that should, while crossing Mississippi, buy kerosene to fill the lamps in the sleeping-cars or coal to replenish the heaters.

In *Pickard* v. *Pullman Co.*, 117 U. S., 34, the court con-

sidered the distinction between a license or privilege tax and a property tax, and, while holding that privilege or license taxes in that case were invalid, yet said that a tax might be laid upon property having a *situs* for taxation in a particular State, even although that property was engaged in interstate commerce.

Therefore there is not involved in this case those decisions of this court which refer to taxes upon receipts from business, or to taxes which are a certain percentage upon receipts from local business where such receipts can be ascertained and separated from gross receipts. *Adams Express Co.* v. *Ohio,* 165 U. S., 220. Neither is there involved the doctrine of other cases in this court where it has been held that a part of the total property of a company engaged in interstate commerce, bearing the same proportion to the total property of the company that the business done in the state bears to the total business done by the company, may be taxed by such state, *American Refrigerating Co.* v. *Hall,* 174 U. S., 70; nor the action of a state in taxing a portion of the capital stock of such company proportioned to its business done in the state. *Pullman Co.* v. *Penna.,* 141 U. S., 18.

In the case at bar we have simply an arbitrary tax against plaintiff in error without regard to the volume of business done in Mississippi or the value of the property used in doing that business. It is an arbitrary tax, really directed at interstate commerce and imposed upon interstate commerce and which cannot be avoided by that commerce.

In *Pullman Co.* v. *Pennsylvania State,* 141 U. S., 25, the court held the tax good *because it was not a tax on business* or occupation but on a part of the capital stock of the corporation proportioned to the property of the company within the State, and therefore a *property tax.*

In several cases this court had held there was an important distinction between a tax upon property and a tax upon the privilege of doing business.

In *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, a privilege tax was sustained because it was a tax imposed,

"*In lieu of all others*, as a privilege tax, and *its amount is graduated according to the amount and value of the property* measured by miles. It is to be noticed that *it is in lieu of all other taxes*, state, county, municipal. * * * This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property" (pp. 697-8).

The court then said that the tax was thereby brought within the rule of the property tax cases and was not really a privilege tax. On page 696 the Court said:

"But *property* in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation *on account of its property* within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State*, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

The third plea, to which a demurrer was sustained and evidence to support which was afterwards ruled out, set up that the sleeping-car fares received from persons riding from one point to another in Mississippi, did not equal the additional expense of having to provide accommodations for that business and that the deficit thus arising operated as a burden upon its interstate business.

The fact that the legislature sought to make the license tax

depend upon the receiving on the cars an intra-state passenger (which is a necessary incident to the interstate business) cannot save the tax or make it valid. In *Crutcher* v. *Kentucky*, 141 U. S., 47, the court, in holding a license tax invalid, said (p. 59):

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. * * * These regulations are clearly a burden and a restriction upon that commerce. *Whether intended as such or not they operate as such.* But taxes or license fees *in good faith* imposed exclusively on express business carried on wholly within the State would be open to no such objection."

In the *Pickard* case the court held the tax void because it was an interference with interstate commerce. In the statement of facts we find the following:

"The same cars also *transported passengers from points in Tennessee to other points in that State* whenever they properly applied for such transportation, but the number of such passengers *bore an inconsiderable proportion to the other passengers* transported in those cars; that those cars ran into, out of or across Tennessee, making such stops as the trains to which they were attached made."

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

To sustain a tax levied upon both kinds of traffic there must be a possibility of separating the two and levying a fair tax upon the intra-state traffic. Such intra-state traffic must be in itself a basis or reason for the tax. It is a violation of the constitution for a state to tax anything because of its relation to interstate commerce.

If the interstate business and the local business upon which only the tax could be sustained, are necessarily so mixed as to preclude separation, a tax thereon is invalid.

Ratterman v. *Western Union T. Co.*, 127 U. S., 411.

In *Leloup* v. *Port of Mobile*, 127 U. S., 640, there had been laid a yearly "license tax" of $225 on telegraph companies and a fine was provided for any violation of the act imposing the tax. The court found that there was imposed upon the telegraph company in addition to the license tax, taxes on its property and also a tax of three-fourths of one per cent. on its gross receipts within the state (p. 645). These latter taxes were not complained of and the court, in holding the license tax invalid, expressly said that such holding

"does not prevent the State from taxing the *property* of those engaged in such commerce located within the state as the *property of other citizens* is taxed" (p. 649).

The court then held that "the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages" (p. 646).

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. *But that fact does not remove the difficulty. The tax affects the whole business without discrimination.* There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company" (p. 647).

In *Lyng* v. *Michigan*, 135 U. S., 166, the Court said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or *on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to

Congress. *Leloup* v. *Mobile,* 127 U. S., 640, 648, and cases cited".

In *State Freight Tax case,* 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State".

Judge Key in *U. S. Express Co.* v. *Allen,* 39 Fed. Rep., 712, said:

"It is essentially a license or privilege tax. There is no description of or limitation of the business. It makes no difference whether it be interstate or intra-state. If it be an Express Company it is taxed".

These cases and numerous others before and since in accord with them, have never been in any way overruled or doubted and do not conflict with the decisions of this court that where a company is engaged in interstate commerce, a part of its property, proportioned to its use in any one State, can be taxed by that State, or that a tax can be placed upon the receipts from that part of the business which is entirely local to the State. Such taxes are *property taxes* as distinguished from license or privilege taxes. They are put on an *ad valorem* basis. Although they may sometimes bear to a slight extent on interstate commerce, they never can control it, while a license or privilege tax relating in any way to interstate commerce or those engaged in it, if valid at all, can quickly be made prohibitive.

The doctrine of *Leloup* v. *Mobile, Lyng* v. *Michigan, Pickard* v. *Pullman Co.* and many other cases before and since is that interstate commerce, *with all its necessary incidents,* cannot be taxed or regulated in any way by a State. This is the general rule, and other cases allowing taxation on a proportioned property basis are but exceptions to the

general rule so long established and adhered to, and, as exceptions, must be strictly kept within the exact principle of those cases. The general rule has never been doubted.

The case of *Osborne* v. *Florida*, 164 U. S., 650, has been cited in support of this tax. We submit, however, that that case differs radically from the case at bar. In that case the business involved was that of an express company. The basis of the opinion is that the express company could engage in interstate business only, and then the act would not apply to it. Moreover, the supreme court of Florida had passed upon the revenue act in question and had given it a construction which this Court accepted as binding. By the construction so given by the Florida court, the tax was directed against local business only, and the express company could have been engaged in interstate business alone without being subject to the tax. But the plaintiff in the case at bar is engaged in an interstate business that necessarily involves some local business. We have not in the case at bar any decision of the supreme court of Mississippi that plaintiff can in any way evade the necessity of paying this license tax.

The main idea of *Osborne* v. *Florida* is contained in that part thereof which, speaking of the express company, says:

"It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state".

In the present case the plaintiff in error could not decline local business and therefore the principle of *Osborne* v. *Florida* does not apply.

In *Osborne* v. *Florida* it is said that if the Florida statute applied to interstate business it would be void. The opinion does not criticise the case of *Crutcher* v. *Kentucky*, 141 U.

S., 47, but distinguishes it. It does not overrule any of the cases on which we rely. In fact the case of *Osborne* v. *Florida* is based almost solely upon the peculiar construction given to the revenue act of that state by the Florida supreme court.

The late cases of *Vance* v. *Vandercock,* 170 U. S., 438; *American Refrigerating Co.* v. *Hall,* 174 U. S., 70, and *Austin* v. *Tennessee,* 179 U. S., 343, which discuss interstate commerce and uphold the right to levy a property tax, do not in any way question or doubt the decisions of this court on the subject of privilege or license taxes, but by implication, and in some cases directly, quote and approve the decisions on property taxes.

Looking strictly to its words, there is nothing in the statute to indicate the taxing of a local business except the words used to designate the character of companies taxed, being those "carrying passengers from one point to another within the state," which apply as well to companies engaged only in interstate commerce within the state, since such companies must necessarily carry their passengers from one point to another in Mississippi.

It is not sticking in the bark to say that the defendant is not subject to the tax because it does not, to quote the statute, "run its cars" over any miles of railroad in Mississippi or elsewhere. The railroad "runs" the cars. Then, too, the statute provides that the tax shall be upon sleeping-car companies "carrying passengers from one point to another." Plaintiff in error does not carry any passengers. It is not a carrier, as is shown later in this brief. Therefore the act cannot apply to it. The statute is of a kind to be strictly construed.

In this connection we invite attention to the difference

between the code provision in force at the time the tax complained of was imposed, and the privilege tax law of 1898, inadvertently quoted by the state supreme court in its opinion. In the former the twenty-five cents per mile is laid on all the miles over which the sleeping-car companies run their cars without reference to the boundaries of the state, while in the latter it is laid only on the miles over which they run them in the state of Mississippi. Section 74 of the Mississippi privilege law of 1898 is as follows:

"Sec. 74. Sleeping-cars.—On each sleeping and palace car company carrying passengers from one point to another in this state, $200.00. And in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars *in this state.*" Laws pp. 24-25.

The fact that the revenue agent saw fit to sue only for the tax on the number of miles in Mississippi does not in any wise alter the statute, which measured the tax by the company's mileage without as well as within the state, thus negativing the idea that only the local business was taxed by subjecting to the tax the company's whole mileage, or, in other words, its whole business.

Plaintiff in error is obliged to furnish sleeping accommodations to travelers local to Mississippi as part of its interstate business and therefore cannot carry on interstate business without subjecting itself to this privilege tax.

The Illinois Central Railroad Company clearly has a right to run through trains from Chicago to New Orleans, traversing the entire length of Mississippi, and Mississippi cannot interfere with or burden such interstate commerce. Passengers on such trains would pay the railroad company a charge for transportation and the Pullman company a charge for sleeping accommodations. All the charges would be for

one transaction, according to *Pickard* v. *Pullman Co.*, 117 U. S., 34.

Indeed Mississippi concedes such to be the case and endeavors to seem to avoid interference with such commerce by providing that this privilege tax shall only spring into effect when a passenger is carried from one to point to another in Mississippi. The sole purpose and desire of the Illinois Central Railroad Company may be to carry through passengers on sleeping-car trains from Chicago to New Orleans. It may desire and hope that it will not be required to carry any local passengers. If, however, by the common or statute law of Mississippi, through trains are required to receive local passengers and furnish them with sleeping-car accommodations, such law must be obeyed. Obedience to such requirement of Mississippi cannot be made the basis for inflicting a privilege tax upon that interstate commerce. If a railroad company having a short run in Mississippi, such as by the record the Memphis & Charleston Road is shown to have, did not wish to stop in Mississippi and did not wish to receive any local passengers and wished only to pass through the state in conducting interstate commerce so far as its sleeping-cars were concerned, the state of Mississippi could not pass a law requiring that company to stop at least once a year and receive upon the train at least one passenger local to Mississippi and give him sleeping accommodations, and then by another act provide that whenever such passenger was so received, a privilege tax of $3,000 a year should be paid by the sleeping-car company. Yet that is what is substantially done in this case.

The first and greatest duty of a common carrier is to accord accommodations equally to all parties who properly apply therefor. It was in recognition of such a principle

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and to secure its enforcement that Mississippi, by section 195 of its Constitution of 1890, provided that:

"Express, Telegraph, Telephone and sleeping-car Companies are declared common carriers in their respective lines of business and subject to liability as such."

This was evidently intended to require the companies enumerated to furnish the service in which they were engaged equally to all parties properly applying therefor. By the adoption of that provision of its Constitution, Mississippi required sleeping-car companies to furnish sleeping accommodations to local passengers. It then followed that provision of the Constitution with the enactment of 1892, which substantially provided that whenever a sleeping-car company, though engaged and wishing to engage only in interstate commerce, as an incident to its interstate business rendered necessary and obligatory by the Constitution of 1890, accommodated a single passenger from one point to another in Mississippi, it should thereupon pay a certain privilege tax not proportioned to property or receipts, and the amount of which was therefore wholly in the discretion of the legislature and might be prohibitive. We can readily imagine a case where through interstate traffic in limited sleeping-car trains having no desire to take any local passengers in Mississippi, could be compelled to receive such a passenger in Mississippi and on receiving a single passenger should thereby become liable to pay an enormous privilege tax that would have the effect of stopping such interstate commerce entirely.

In the present case we pleaded and sought to prove that this local sleeping-car traffic, forced upon us by Mississippi, was conducted at a loss and was now a burden upon the interstate traffic.

Even without the provision of the Constitution of 1890

it is probable that the sleeping-car company would be obliged as a necessary incident of its other sleeping-car business, to accept local passengers. The Pullman Company is not a common carrier. In discussing its liability for a theft from a passenger on its car, it is said in *Pullman Co.* v. *Smith*, 73 Ill., 360, 365:

"The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

"Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company."

The same principle is laid down in *Pullman Co.* v. *Gavin*, 93 Tenn., 53, and in many other cases, state and federal, quoted in *Elliott on Railroads*, sec. 1616.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, a question arose as to the duty of the Pullman Company to afford sleeping-car accommodations to a party who properly applied therefor, and it was held that although a sleeping-car company was not a common carrier, yet it was engaged in a public employment on railroads which were operated under public franchises, that it owed a duty to all the public alike and that it must receive into its cars all persons who properly applied for accommodations.

Elliott on Railroads, sec. 1617, states the same doctrine and cites many authorities in support thereof.

The answer to this position made by the supreme court of Mississippi in the closing paragraph of its opinion (pr. rec. p. 18) is too fallacious to need comment. It attempts to escape this conclusion by saying that if Mississippi has encroached upon the interstate commerce clause of the Constitution, in the manner above indicated, it is by the provision of the constitution of 1890, making the sleeping-car

company a common carrier, and not by the license tax statute. A sufficient answer to this ought to be that the court cannot thus uphold the tax by merely supposing that the constitution is unconstitutional. But the provision of the constitution of Mississippi, in so far as it relates to plaintiff in error, is not necessarily unconstitutional and we are not complaining of it. It may be proper that all sleeping-car companies should be declared common carriers. Neither side to this controversy is asking the court to hold the provision of the constitution of 1890 unconstitutional. It stands as a law recognized by both sides.

But this provision of the Mississippi license act seeking to make the business liable to a heavy tax if only a single passenger tenders fare for intra-state accommodation, is but a subterfuge to evade the interstate commerce clause of the Constitution.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, it is said (p. 58):

"It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *United States Express Co.* v. *Allen*, 39 Fed. Rep., 712, the court, in speaking of such a provision in a revenue act, said:

"But is not this provision of the statute a mere device to fasten the tax upon the company? It is no exercise of the police power of the state. If the tax be paid, it makes not the slightest difference whether the packages taken up and carried and delivered between and at points in the state

be one or a million. It is not a tax regulated by the amount of business. It is as much if one package be carried as if ten millions go. A package of a dime in value, carried five miles, may involve a license fee of $1,000 or $3,000, depending altogether on the length of the line of transportation used by the company".

In *Austin* v. *Tennessee,* 179 U. S., 343, the court said:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (p. 350).

"We endorse fully what was said by this court in *Mugler* v. *Kansas,* 123 U. S., 623, 661: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution' " (p. 344).

In *Morgan* v. *Louisiana,* 118 U. S., 462, the Court said:

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In whatever language a statute may be framed, its purpose and its validity under the interstate commerce clause of the federal constitution must be determined by its natural and reasonable effect.

Henderson v. *New York,* 92 U. S., 259, 268.

The test in such a case is upon what does the burden really rest? The tax is not valid because laid upon local and domestic as well as interstate traffic.

Case of the State Freight Tax, 15 Wall., 232, 272.

It is sometimes said that a state is entitled to impose a tax on account of the protection it accords to the instrumentalities of interstate commerce. As between different countries this may be so, as between states bound by the same federal constitution, it is not so. There is a certain reciprocity necessary between the states. This court at one time stopped Colorado from levying a dollar a head on persons crossing the state. It was then argued that such passengers were under the protection of the laws of Colorado while in that state and should pay for it. The relations of the different states to each other under the federal constitution are such that a citizen of one state has a right to demand protection of the laws of a neighboring state while in it. So business and freight can be transported across a state without stopping and it would not be seriously contended that it could be taxed. Yet it would be protected during such transit. The account between any two states concerning the protection afforded to the citizens and property of the other while passing through it may not be evenly balanced for any one month, but in the long run the account is about balanced, and whether it is or not the federal constitution contemplates that there shall be reciprocity in the protection afforded by one state to another both over citizens and property. The argument is therefore fallacious that a state acquires a right to tax either a person or his property simply because they pass through that state and are temporarily under the protection of its laws.

There is no distinction in principle between persons and property. If there is reciprocity between the States in the protection of each other's citizens, there is also in regard to property. If the intercourse between States is that of wholly independent nations, the claim of right to tax may be good.

but it should be allowed equally on persons and property. If the Constitution of the United States has abolished foreign lines between the States and given reciprocal rights to the citizens of the States, those rights must apply to their property also, and in the end the protection ledger will balance throughout the whole nation.

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